PANG CHEE MENG

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
ABDUL HAMID OMAR LP
MOHD. YUSOFF MOHAMED SCJ
EUSOFF CHIN J
[SC CRIMINAL APPEAL NO. 05-159-90]
28 NOVEMBER 1991

CIVIL PROCEDURE: *Trial Judges - Criminal proceedings - Totality of approach - Misdirection on burden of proof - Doubt as to thoroughness of police investigation - Failure of accused to testify - No adverse inference to be drawn.*

EVIDENCE: *Statement made in answer to a question - Information leading to the discovery of fact - Admissibility - Courts to be vigilant to prevent abuse - Information not subject of a contemporaneous record - Attempt to introduce such statement - Serious contradictions in prosecution evidence - Rationale of s. 27 - Evidence Act 1950, ss. 25, 26, 27.*

The appellant was convicted of an offence of trafficking in dangerous drugs under s. 39B(1) of DDA 1952.

It was the prosecution's case that upon arrest, the accused allegedly gave information to the police party which led to the discovery of the drugs. At all times after his arrest, however the accused denied any knowledge of the drugs or that he gave any information leading to the discovery of the drugs.

It was the appellant's contention in this appeal that the learned Judge was wrong in admitting a statement made by the appellant in answer to a question put to him by a police inspector as information admissible under s. 27 of the Evidence Act 1950 (the Act), and further that the learned Judge was wrong:

(a) in not concluding that the room was not exclusively occupied by the appellant;

(b) in concluding that it was difficult to believe that Ah Seng and Ah Fatt were the other co-tenants of the room and

(c) in drawing an adverse inference against the defence for failing to call the appellant's sister, P, as a witness.

Held:

[1] In invoking s. 27 of the Evidence Act 1950, the Courts should be very vigilant to ensure the credibility of evidence by the police personnel in respect of this section, which is so vulnerable to abuse.

[2] In this case, the scattered pieces of prosecution evidence created a doubt as to the thoroughness of the police investigation. There were serious contradictions in the information which allegedly came from the appellant and which the prosecution contended led to the discovery of the drugs in question.

[3] While the precise question put to the appellant is evident, the true substance of the information given by the appellant is not altogether clear in the light of the contradictions inherent in the prosecution evidence. Thus it was difficult to determine what the appellant intended to convey, which led to the discovery of the drugs.

[4] The rationale behind this section revolves on the basis that if a fact is actually discovered in consequence of information given by the accused in custody some degree of guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence over-riding the Criminal Procedure Code and other written laws.

[5] After studying his grounds of judgment there was doubt as to whether the approach of the trial Judge was right in some respects especially with regard to the burden of proof; the disturbing feature in regard to the discovery was the admissibility of the evidence under s. 27 that was initially rejected by the Court.

[6] The trial Judge erroneously directed himself as to the principles to be applied in determining various issues of fact and law.

[7] The defence of the accused was probable and more than adequate to rebut the case for the prosecution.

[8] Whether the accused testifies or adopts other means is a matter of choice for him and his Counsel. No adverse inferences can be drawn or seen to be drawn only because he exercised his liberty to choose any particular course.

[Appeal allowed; conviction quashed; accused discharged and acquitted.]

[**Bahasa Malaysia** Translation Of Headnote]

PROSEDUR SIVIL: *Hakim perbicaraan - Prosiding jenayah - Keseluruhan pendekatan - Beban bukti - Keraguan mengenai kesempurnaan siasatan polis - Kegagalan tertuduh memberi keterangan - Inferens*

UNDANG-UNDANG KETERANGAN: *Pernyataan dibuat sebagai jawapan kepada satu soalan - Maklumat membawa penemuan fakta - Kebolehterimaan - Mahkamah harus berjaga-jaga supaya menghalang penyalahgunaan kuasa - Maklumat bukan perkara dalam satu rekod semasa - Memperkenalkan pernyataan sedemikian - Percanggahan serius dalam keterangan pendakwaan - Tujuan s. 27 - Akta Keterangan 1950, ss. 25, 26 & 27.*

Perayu telah disabitkan atas kesalahan mengedar dadah berbahaya dibawah s. 39B(1) Akta Dadah Berbahaya 1952. Kes pendakwaan adalah bahawa setelah ditangkap tertuduh dikatakan telah memberi maklumat kepada pasukan polis yang membawa kepada penemuan dadah itu.

Selepas tangkapan, tertuduh sentiasa menafikan sebarang pengetahuan tentang dadah itu atau bahawa dia memberi sebarang maklumat yang membawa kepada penemuan dadah itu.

Pihak perayu berhujah bahawa Hakim yang arif tidak sepatutnya menerima sebagai bukti pernyataan yang dibuat oleh perayu apabila menjawab satu soalan yang dikemukakan oleh seorang inspektor polis sebagai maklumat yang boleh terima dibawah s. 27 Akta Keterangan 1950. Tambahan pula Hakim mengambil tindakan yang salah:

(a) kerana tidak menerima keterangan yang bilik dimana dadah itu dijumpai itu bukan diduduki oleh perayu seorang;

(b) apabila beliau tidak menerima keterangan bahawa Ah Seng dan Ah Fat adalah penghuni bilik tersebut.

(c) dalam membuat inferens menentang terhadap pembelaan kerana kegagalan memanggil kakak perayu P sebagai saksi.

Diputuskan:

[1] Apabila s. 27 Akta tersebut dipakai mahkamah harus berjaga-jaga bagi memastikan kredibiliti keterangan oleh kakitangan polis berhubung dengan seksyen ini, yang sering terdedah kepada penyalahgunaan.

[2] Dalam kes ini keterangan pendakwaan yang berselerak menimbulkan keraguan terhadap kesempurnaan siasatan polis. Terdapat percanggahan serius dalam maklumat yang dikatakan diperolehi daripada perayu dan yang pendakwaan mendakwa membawa kepada penemuan dadah itu.

[3] Walaupun soalan yang tepat yang dikemukakan kepada perayu adalah jelas, isi sebenar maklumat yang diberi oleh perayu tidak jelas sama sekali memandangkan percanggahan 'inherent' dalam keterangan pendakwaan. Seterusnya ia menjadikan penentuan tujuan sebenarnya maklumat itu yang diberi oleh perayu dan membawa kepada penemuan dadah itu sukar.

[4] Tujuan disebalik sesyen ini berpusar di atas dasar bahawa jika satu fakta adalah ditemui selepas maklumat diberi oleh tertuduh dalam tahanan, sedikit tahap jaminan adalah diberikan yang maklumat itu adalah benar dan oleh sebab itu ia boleh dibenarkan dalam keterangan serta mengatasi kanun prosedur jenayah dan undang-undang bertulis yang lain.

[5] Setelah meneliti alasan penghakiman, terdapat keraguan sama ada pandangan yang betul diambil oleh Hakim yang arif dalam beberapa segi terutamanya berhubung dengan beban bukti.

[6] Hakim perbicaraan telah keliru mengenai prinsip-prinsip yang patut digunakan dalam menentukan berbagai isu fakta dan undang-undang.

[7] Pembelaan tertuduh adalah berkemungkinan ('probable') dan lebih daripada mencukupi untuk menyangkal kes pendakwaan. Tiada inferens menentang yang boleh dibuat ('seen to be drawn') hanya kerana dia membuat pilihan untuk memberi keterangan secara sumpah.

[8] Sama ada tertuduh memberi keterangan atau menggunakan cara lain adalah pilihan yang terpulang kepada dia dan peguamnya. Tiada inferens menentang yang boleh dibuat atau dilihat sebagai dibuat hanya kerana dia menggunakan kebebasan untuk memilih sebarang cara tertentu.

[Rayuan dibenarkan; sabitan dibatalkan; tertuduh dilepaskan dan dibebaskan.]

Cases referred to:

Wai Chan Leong v. PP [1989] 1 CLJ (Rep) 171 ***(foll)***
Woolmington v. DPP [1935] AC 462 ***(foll)***
R. v. Carr-Briant [1943] 29 CR Appx r 76 ***(foll)***

Legislation referred to:

Dangerous Drugs Act 1952, ss. 39B(1)(a), 39B(2)
Evidence Act 1950, ss. 25, 26, 27

For the appellant - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent - C.T. Wong, DPP

JUDGMENT

Abdul Hamid Omar LP:

This appeal by Pang Chee Meng is against his conviction and sentence by the learned Judicial Commissioner sitting at Kuala Lumpur on a charge as follows:

Bahawa kamu pada 12 September 1987 jam lebih kurang 2.10 pagi di rumah No. 13F Jalan Kalong off Jalan Sungei Besi, di dalam Bandaraya Kuala Lumpur, di dalam Wilayah Persekutuan telah mengedar dadah berbahaya, iaitu 353.86 gram heroin dan oleh yang demikian kamu telah melakukan suatu kesalahan di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952 (Disemak 1980) dan boleh dihukum di bawah s. 39B(2) Akta yang sama.

Karpal Singh appearing on behalf of the appellant urged that the appeal be allowed and the conviction set aside principally on ground that the learned Judge was wrong in admitting a statement made by the appellant in answer to a question put to him by Inspector Kamaruddin (PW1) as information admissible under s. 27 of the Evidence Act. Karpal Singh contended that (a) the said information had not been the subject of a contemporaneous record and (b) there were serious contradictions in the evidence of PW1 and PW6 in regard to the statement to justify the admission of such evidence as information leading to the discovery of the drug.

Three other subsidiary grounds were also raised:

Firstly, the learned Judicial Commissioner was wrong (a) in not concluding the room was not exclusively occupied by the appellant; secondly, in concluding the existence of Ah Seng and Ah Fatt as the other co-tenants of the room difficult to believe; thirdly, in drawing an adverse inference against the defence for failing to call the appellant's sister, Phang Sow Ying, as a witness.

The undisputed facts of the case are simple. Acting on information, the police laid an ambush for the accused near the place where the accused was known to be living. Upon arrest, the accused allegedly gave information to the police party which led to discovery of heroin, the subject matter of the charge. The drugs were found in a room he was known to be living. At all times, after his arrest, the accused denied any knowledge of the drugs or that he gave any information. He maintained that he was not proficient in Bahasa and that he did not have exclusive possession of the room where the police found the drugs. In a cautioned statement following his arrest he named two persons sharing the room with him. Upon defence being called he chose to give evidence on oath and there appears nothing improbable with his version, whether true or not. Unfortunately, the trial was conducted rather haphazardly in that on some occasions inadmissible evidence was recorded although later rectified. The police investigation cannot be said to be very satisfactory. As for the information given by the appellant, Inspector Kamaruddin (PW1) who initially introduced in evidence such information said that in reply to his question

Di mana lu simpan itu dadah? (Where do you keep the drugs?),

the appellant replied:

Saya simpan di bilik atas room saya. (I keep in my room upstairs.)

At this juncture the defence objected to the admissibility of the statement on ground that as the appellant was under arrest and no caution was administered the statement was therefore not admissible. The learned Judicial Commissioner ruled in favour of the defence and held that the statement made by the appellant

Saya simpan di bilik atas room saya

was not admissible. Subsequently, however, Inspector Kamaruddin was recalled by the prosecution and the information given by the appellant was again adduced and at that point of the proceedings the appellant is alleged to have said:

Itu barang tidak ada di kereta. Itu barang ada atas rumah. (The thing is in the house upstairs.)

However under cross-examination, Inspector Kamaruddin stated that the appellant's response to his question was:

> Tiada di dalam kereta tetapi ada di rumah.

Thereafter the prosecution proceeded to adduce evidence from PW6 who said that he heard Inspector Kamaruddin asking the appellant about the drug and the reply was:

> Dalam kereta tidak ada tetapi di rumah. (It was not in the car but at the house.)

Upon careful perusal of the evidence of PW1 and PW6, we are of the view that there are serious contradictions in the information which allegedly came from the appellant and which the prosecution contended led to the discovery of the drugs in question. While the precise question put to the appellant is evident, the true substance of the information given by the appellant is not altogether clear in the light of the contradictions inherent in the prosecution evidence. Consequently it makes determination of what precisely that information was intended to be conveyed by the appellant leading to the discovery of the drugs difficult.

The rationale behind this section revolves on the basis that if a fact is actually discovered in consequence of information given by the accused in custody some degree of guarantee is afforded thereby that the information was true and accordingly can be safely allowed to be given in evidence over-riding the Criminal Procedure Code and other written laws. The effect of interplay between this section and other provisions of law was clearly enunciated in Supreme Court decision *Wai Chan Leong v. PP* [1989] 1 CLJ (Rep) 171 where it was held that:

> The word 'information' in s. 27, unlike a statement, includes knowledge derived by the person informed by the accused as well as the means taken to impart that knowledge.

While this section, an exception to other laws in the particular respect is very useful to the detection of crimes, the founding fathers of jurisprudential textbooks on Indian Evidence Act which is in *pari materia* with our Ordinance, have emphasised on the question of discovery that "s. 27" has frequently been misused by the police and Courts should be vigilant about the circumvention of its provisions. The protection afforded by the wholesome provisions of ss. 25 and 26 may sometimes be whittled down by the police by their ingenuity to get the information given by the accused recorded in the case diary in a way which it would appear that it led to the discovery of some facts although the police might have made such discovery from other sources. We are not suggesting that the practice by the local police is the same as in India, nevertheless, we are firmly of the view that in invoking s. 27, the Courts should be very vigilant to ensure the credibility of evidence by the police personnel in respect of this section, which is so vulnerable to abuse.

One interesting question posed to us in this case is whether the High Court erred on this principle. For the determination of this appeal, we do not think it necessary to consider the attitude and finding of the learned Judicial Commissioner in isolation. Instead, it is sufficient for us to review the effect of totality of his approach to the whole case. After studying his grounds of judgment, we are in doubt whether his approach was right in some respects especially with regard to the burden of proof. In this context, we have specially directed our mind to the notes of evidence which clearly show that:

(a) 1st prosecution witness, Inspector Kamaruddin bin Hj. Abdul Rahman admitted in evidence (Page II) when he said:

> I agree there was a difference between my earlier statement and now.
>
> I am not sure whether the room was occupied by more than one person taking into consideration there were 2 cupboards and various clothings.

(b) PW5 Inspector Basharuddin b. Mohd. Nordin stated:

> I was aware of 2 males named Ah Seng and Ah Fatt on my first visit to 13F.
>
> I did not take fingerprints in the room to determine the existence of Ah Seng and Ah Fatt. I agree that if I have carried fingerprints dusting I would be able to determine the people in the room.
>
> I did not ask for description of Ah Seng and Ah Fatt from sister of the accused or other persons.

These scattered pieces of evidence create lurking doubt in our mind on the thoroughness of police investigation. In the instant case the accused denied that he led the police to the discovery of the drugs and that in any event he did not have exclusive possession of the room where the heroin was found, in that there were at least three others with access to the room, namely Ah Seng, Ah Fatt and the accused's sister Phang Sow Ying. And the disturbing feature in regard to the discovery was the admissibility of the evidence under s. 27 that was initially rejected by the Court. With regard to the learned Judge's approach, one point to which we focussed our attention is "Did he misdirect himself on the burden of proof in this case?" At the risk of repetition we wish to quote the time-honoured principles of English law which we follow strictly, unless local circumstances and legislation dictate otherwise. In *Woolmington v. DPP* [1935] AC 462 Lord Sankey said:

> Throughout the web of English criminal law, one golden thread is always to be seen, that it is the duty of the prosecution to prove the person's guilt. If at the end of and on the whole of the case, there is reasonable doubt, created by the evidence given either by the prosecution or the prisoner as to whether the offence was committed by him, the prosecution has not made out the case and the prisoner is entitled to an acquittal.

In later cases it has been stated that a reasonable doubt is the sort of doubt that might affect the mind of a person in dealing with matters of importance in his own affairs. The required standard is less than "certainty". Later in *R. v. Carr-Briant* [1943] 29 CR Appx r. 76, 87 amplifying the above principle it was stated that:

> In any case where either by statute or at common law, some matter is presumed against an accused person unless contrary is proved the jury should be directed that the burden of proof required is a reasonable doubt, and that the burden may be discharged by evidence satisfying the jury or the probability of that which the accused is called upon to establish.

Both the above principles have been reaffirmed by many cases in UK and locally and we cannot do better than quote the original sources for the information of everyone in the profession.

In the present case, reading the grounds of judgment, we cannot escape the feeling that the trial Judge erroneously directed himself as to the principles to be applied in determining various issues of fact and law. We are very reluctant to disturb a finding of fact by any trial Judge except when he misdirected himself as to how to assess the evidence. Many of the expressions used in the Judge's grounds of judgment indicate that he apparently adopted the wrong approach. By saying so, we refrain from expressing any opinion as to the role of the accused or anybody else in the whole episode. It is sufficient for us to say that the defence of the accused was probable and more than adequate to rebut the case for prosecution. To illustrate the approach of the learned Judicial Commissioner let us quote instances from his finding. He said:

> once defence is called accused must testify and support his contention with evidence both from witnesses or otherwise that he is not guilty of the charge.

This sentence interpreted narrowly would mean that the trial Judge expected a higher standard of proof from the defence than of creating a reasonable doubt. Whether the accused testifies or adopts other means is a matter of choice for him and his Counsel. No adverse inferences can be drawn or seen to be drawn only because he exercised his liberty to choose any particular course. Having closely perused the evidence ourselves, we find it difficult to believe that the Judicial Commissioner's expression is merely a matter of style and language and not of substance. The learned Judicial Commissioner was manifestly wrong to find as a fact that the accused had exclusive possession when all the while his stand, when he made the cautioned statement, had been that there were three others sharing the accommodation. There is some degree of corroboration in the prosecution investigation to this contention. If some of these claimed witnesses cannot be traced, it was a combination of unhappy circumstances in this case. The accused cannot be penalised for lack of ingenuity in police investigations depriving him of the time-honoured benefit of doubt.

In the light of the material contradictions and the circumstances surrounding we are not satisfied that prosecution had proved exclusive custody and control of the drugs found in the room. We accordingly decided at the conclusion of hearing to allow the appeal and quash conviction. Accordingly, the accused was discharged and acquitted.

Also found at [1992] 1 CLJ 39